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MAY 25 1951

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS,

v.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA

**MOTION BY SOUTHERN RAILWAY COMPANY, AP-
PELLEE, FOR AN ORDER THAT THE MANDATE
OF THIS COURT REQUIRE THE DISTRICT COURT
TO RETAIN JURISDICTION PENDING APPELLEE'S
RESORT TO THE STATE COURTS OF ALABAMA.**

SIDNEY S. ALDERMAN,

CHARLES CLARK,

Attorneys for Appellee,

Southern Railway Company.

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RESORT TO THE STATE COURTS OF ALABAMA.**

Comes now, in due season, Southern Railway Company, appellee in the above-entitled cause, and moves this Honorable Court to include in its mandate which it will issue in the above-entitled cause a provision in terms directing the United States District Court for the Middle District of Alabama to retain jurisdiction of the cause and continue in effect the injunction it issued therein on the twentieth day of July, 1950 (R. 71) * for a reasonable time within which to permit appellee promptly to resort to the state

courts of Alabama for determination and adjudication of its rights in the subject matter of this cause. In support of this motion appellee respectfully shows:

Mr. Chief Justice Vinson, in delivering the opinion of the Court in this cause, on May 21, 1951, said:

"Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous, as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court. Id. § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.' *Avery Freight Lines, Inc. v. White*, 245 Ala. 618, 622-623, 18 So. 2d 394, 398 (1944)."

And:

"Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code, 1940, §§ 81, 84."

And:

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights."

The order of the Alabama Public Service Commission in its Docket 11988 denying appellee's application to discontinue operation of Trains 7 and 8 involved in this cause was issued April 3, 1950 (R. 27).

The thirty-day period provided under Alabama Code 1940, § 79, within which appellee, applicant before the state commission, might have entered its appeal from said order to the Circuit Court of Montgomery County, Alabama, has expired.

The two trains, Nos. 7 and 8, were discontinued following the entry of the decree in the United States District Court on July 20, 1950, in Civil Action No. 681.

In *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941), provision was made by this Court in keeping with appellee's motion here, for at page 501 of that opinion this Court said:

"We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion."

In *Spector Motor Co. v. McLaughlin*, 323 U. S. 101 (1944), this Court again gave direction in keeping with the motion of appellee here, for, at page 106, it was said:

"We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion."

In the earlier case of *St. Louis &c. R. Co. v. Public Comm'n.*, 279 U. S. 560 (1929), the Railway had discontinued the operation of two passenger trains without preliminary application to the Alabama Commission for authority to discontinue them. The Railway on its bill filed in the United States District Court for the Middle District of Alabama obtained a restraining order to protect it incident to such discontinuance. This Court, holding that the Railway should have first made its application to the State Commission, vacated the decree of the District Court, but in that connection, at page 563, said:

“* * * The Commission should give to the Railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the Commission without subjecting the Railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare *Lawrence v. St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To this end the decree will be vacated; and the restraining order will be continued.”

Should this motion be denied, when Southern Railway Company, appellee here, resorts to the state courts of Alabama, it might be urged, and perhaps with success, by those in opposition, that Southern Railway Company by resorting to the United States District Court instead of taking its appeal under the state statute to the Circuit Court of Montgomery County within the thirty-day period provided in the state statute, has thereby lost its right to such appeal and now comes too late for consideration to be given its case in the state courts.

Appellee ought not to be prejudiced by reason of the fact that it elected to resort to the federal district court below, which this Court unanimously holds had jurisdiction of its cause.

WHEREFORE, Southern Railway Company, appellee in this cause, moves the Court to provide in its mandate that the District Court retain jurisdiction and continue the injunction granted by it in order to permit appellee promptly to go to the Circuit Court of Montgomery County, Alabama, and there assert its rights in keeping with the pronouncement of this Court in its opinion rendered herein on May 21, 1951.

Respectfully submitted,

SIDNEY S. ALDERMAN,

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Attorneys for Appellee,

Southern Railway Company.

